Nos. 14648 and 14649

In the United States Court of Appeals for the Ninth Circuit

CIVIL AERONAUTICS BOARD, APPELLANT

v.

FRIEDKIN AERONAUTICS, INC., D/B/A PACIFIC SOUTHWEST AIRLINES, APPELLEE

CIVIL AERONAUTICS BOARD, APPELLANT

v.

CALIFORNIA CENTRAL AIRLINES, INC., APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANT CIVIL AERONAUTICS BOARD

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Appellant deems it appropriate to file this reply brief in order to clarify the fundamental question presented to the Court for decision. We demonstrate below that the arguments advanced in the brief of appellee Pacific Southwest are neither apposite to the determination of that question nor otherwise meritorious.

I

Appellee's first contention is that the definition of interstate air transportation contained in the Civil

Aeronautics Act (Sec. 1 (21)), which governs the scope of appellant's economic regulatory jurisdiction, does not, under any circumstances, extend to common carriers by air unless their aircraft physically cross state lines. Having thus stated the proposition, appellee leaves it completely unsupported. Instead of giving attention to the language of the statute itself, appellee points to law review articles (Br., pp. 8–10), court decisions (Br., pp. 11–13), the report of the President's Air Coordinating Committee (Br., p. 14), and recent proposed amendments to the Civil Aeronautics Act (Br., pp. 19–20), all of which are primarily concerned with the problem of whether Congress through that Act has asserted exclusive economic regulatory control over intrastate air carrier operations.

Although perhaps interesting as an abstract legal dissertation, appellee's treatment of this question has no bearing on the basic issue here involved. As we have pointed out (appellant's brief pp. 4, 5, 9, 13), there is no question presented in these actions as to whether Congress has preempted or occupied the field of economic regulation of intrastate common carriers by air. Thus, whether intrastate operations, regardless of the nature of the traffic carried, may "affect" or "burden" interstate commerce is not a pertinent consideration.[1] Rather, the crux of the problem is

[1] The Board's reference to the termination of appellee California Central's operations as having a negligible effect upon interstate air transportation (Br., pp. 16, 17) was made in a proceeding involving the question of approval of inter-air carrier transactions under sections 408 and 412 of the Act (49 U. S. C. 488; 49 U. S. C. 492), in which antitrust and monopoly considerations are domi-

whether intrastate carriers, such as appellees, who participate as integral parts of substantial and continuous interstate movements, are within the coverage of the statutory definition of interstate air transportation. We think it plain from the face of the statute, as well as its legislative history and applicable case law, that they are (appellant's brief, pp. 9–16). Appellee's references to matters of preemption, occupation or usurpation of the field of intrastate carriage avails it nothing in the circumstances of the present actions.

Appellee's misapprehension of the nature of the problem is exemplified by the treatment accorded the article by Mr. Oswald Ryan, former member of the Civil Aeronautics Board, in the Virginia Law Review (Br., pp. 8–10). In the quoted portions of the article, Mr. Ryan discusses the differences in the regulatory pattern for the economic and safety aspects of air carrier operations and the general question of federal control over intrastate air carriers, neither of which, of course, are determinative of the present issue. What appellee apparently overlooked, however, is the following passage in Mr. Ryan's article, the only one here pertinent (at p. 483):

> The Civil Aeronautics Act of 1938, as previously noted, limited its economic control to air transportation defined as interstate, overseas or foreign air transportation or the transportation of mail by aircraft. Thus, non-mail air

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nant, and obviously this determination has no relevancy to the question of appropriate certificate authority being required for unauthorized operations.

> carriers whose routes lie wholly within the limits of a single state *and which do not transport traffic moving in interstate commerce* are not included within the terms of the act. [Emphasis supplied.]

II

Appellee next adverts to several administrative and judicial decisions which it construes as supporting its argument that the Board has no jurisdiction over the type of operations disclosed by the present record.

Administrative determinations that appellee's primary business may be that of providing intrastate air transportation for the purposes of interpreting the coverage of the Railway Labor Act (Br., p. 24) or the National Labor Relations Act (Br., p. 25) are, of course, no authority for the proposition that upon the facts of this record appellees cannot be found to have engaged in interstate commerce as to a substantial portion of their operations. Neither of the agencies concerned passed upon the facts here involved nor are they competent to determine the applicability of the Civil Aeronautics Act. Moreover, appellee's reliance on the cases of *New York Central R. Co.* v. *Mahoney,* 252 U. S. 152 (1920) (Br., p. 28) and *Gulf, Colorado & Sante Fe Railway Co. v. Texas,* 204 U. S. 403 (1907) (Br., p. 29) is plainly misplaced. To the extent that these cases can be said to hold that, for regulatory purposes, the contract between passenger and carrier alone determines whether the commerce is interstate or not, they have been implicitly overruled by later Supreme Court decisions. (Appellant's

brief, p. 7, fn. 2; p. 17; p. 20, fn. 14.) Clearly, the nature of the contract is but one factor to be considered in determining the essential character of the commerce as interstate or intrastate.[2]

Appellee's efforts to distinguish the *Capital Transit* cases and thereby avoid the sweep of those decisions must also fail. The Court there had before it the issues *inter alia* of (1) whether Transit's operations constituted "interstate transportation" for the purpose of ordering through-fare arrangements, or (2) whether they were within a proviso of section 216 (e) of the Motor Carrier Act exempting "intrastate transportation" of motor carriers from regulation by the Interstate Commerce Commission. In the second *Capital Transit case* [338 U. S. 286], the Court said (at p. 290):

> * * * Our previous holding [325 U. S. 357] was that all of Transit's intra-District carriage of passengers bound to and from the Virginia establishments was part of an "interstate" movement and therefore subject to Commission regulation throughout, upon proper Commission findings. *United States* v. *Yellow Cab Co., supra,* does not conflict with our prior holding

[2] The case of *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21 (1903), also cited by appellee is equally unpersuasive. In that case the Court held that a cab service from New York City to the Jersey City ferry, operated by a railroad for the convenience of its passengers at the latter's expense, was a local service and therefore subject to a New York tax. It is well established that tax questions depending upon interstate commerce are not authority in cases involving federal or state regulation of commerce. *Hanley* v. *Kansas City Southern Ry.*, 187 U. S. 617, 621 (1903); *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 303 U. S. 453, 466 (1938).

> that Transit's transportation was part of a continuous stream of interstate transportation. We adhere to that holding. Transit's intra-District streetcar and bus transportation of passengers going to and from the Virginia establishments is an integral part of an interstate movement.

The *Capital Transit* decisions thus plainly control the present actions.

III

The balance of appellee's brief is directed to the facts developed in the record. Appellee's position seems to be that the carriage of interstate passengers by them has been *de minimus* (Br., p. 36), or "virtually *de minimus*" (Br., p. 6); that interstate activities resulted from the action of ticket agents for non-scheduled carriers rather than their own employees (Br., pp. 2, 35); and that their "arrangements" with other carriers amount to no more than the simultaneous sale of tickets upon the lines of such carriers and appellees by independent ticket agencies (Br., p. 6). Appellees also profess an inability to ascertain the true origin or destination of their passengers or to otherwise guard against interstate carriage (Br., pp. 34, 36).

There can be no reasonable doubt that appellees are, in the regular course of business, participating without restriction in the transportation of interstate passengers and that that participation is substantial. There is no ambiguity in the Court's findings on this score (14648, pp. 78, 84). If any further clarification is needed of the Court's views in this respect, it can

be found in the following statement by the Court after the conclusion of the hearing (R. 360):

> The COURT. Before you present any testimony, if you want to present testimony relative to the issue before the court, the government has stated the case, I think, very clearly. The defendant has regularly and persistently transported persons as a common carrier for compensation and hire between various cities in the State of California when such transportation involved the commencement or termination of an interstate journey.
>
> We have testimony before us from the various witnesses that I think definitely establishes that the defendants transported passengers when the transportation involved the commencement or termination of an interstate journey.
>
> If you have got any testimony to the effect that the witnesses who testified didn't testify correctly, that might be a point.

The record is also replete not only with documentation of specific flights but also with facts designed to show that the carriage of such passengers was virtually a daily occurrence over protracted periods of time (14648, pp. 16, 18, 25, 36, 38; 14649, pp. 26, 34). The evidence thus advanced was not disproved or controverted by appellees, who offered no evidence.[3]

[3] It should also be pointed out that appellee's argument concerning *de minimus* is at variance with the contention in Point I of its brief that the Board's economic control does not attach unless state lines are crossed. If the latter were true, presumably appellees could carry passengers in the process of an interstate journey without limitation. Moreover, were the *de minimus* doctrine to be applicable (which is plainly not the case here), it

Appellees' protestations regarding lack of knowledge of the interstate character of their business and the absence of arrangements with transcontinental interstate air carriers cannot be accepted. To the extent that appellees may be attempting to disclaim the activities of ticket agents with whom they transact business, it is clear that they cannot do so. Appellees are fully chargeable with knowledge of and responsibility for those activities. *Air Transport Associates, Inc.* v. *Civil Aeronautics Board,* 199 F. 2d 181, 186 (C. A. D. C., 1952), cert. den., 344 U. S. 922 (1953). Moreover, the evidence leaves no doubt that appellee's participation in the interstate movement is undertaken with full knowledge that they are transporting interstate passengers. This knowledge stems from persons such as operations agents, reservationists, and pilots, all of whom are direct employees of appellees (R. 184, 218, 219, 264, 289, 319, 357).

Similarly, the existence of close working arrangements between appellees and the transcontinental nonscheduled carriers is apparent from the face of the record. These are not limited to "the simultaneous sale of tickets," as appellees would have the Court believe. Thus arrangements for onward passage on appellees' aircraft are normally made in advance of the arrival of a nonscheduled carrier at Burbank; the passenger is, for all practical purposes, treated as a through passenger moving on one ticket from origin to

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would simply mean that the volume of traffic carried was so insignificant that the exercise of jurisdiction was not warranted, and *not* that the carriage of interstate traffic by an intrastate carrier does not constitute interstate air transportation.

destination; and the cost on the intrastate leg of the journey is not paid by the individual passenger but is absorbed by the transcontinental carriers upon receipt of a billing from appellees therefor. These facts, together with those outlined in more detail in our opening brief (appellant's brief, pp. 16–20), admit of no conclusion but that appellees are knowing and willing participants in the interstate movement.

We reiterate that appellant here is asserting the applicability of section 401 and the other economic regulatory provisions of the Civil Aeronautics Act only to those operations of appellees which constitute interstate commerce as that term is commonly understood and applied. There is no question of conflict between federal and state regulation, and regulatory action by both State and national governments within their respective spheres is perfectly compatible.[4] We recognize that there might be situations in which it would be difficult for an intrastate carrier to determine whether its passengers are in interstate trans-

[4] So far as we are aware, the Public Utilities Commission of California does not claim power to regulate the interstate operations of intrastate carriers. Indeed, the Commission appears to have specifically disclaimed such power. In litigation before the Supreme Court of California the Commission stated that "also by way of preliminary remarks the Commission wishes this Court clearly to understand that the Commission does not seek to exercise any jurisdiction over interstate fares. The only fares of air carriers which are considered subject to the Commission's jurisdiction and which the Commission seeks to regulate are intrastate fares charged intrastate passengers." Answer of the P. U. C. of Calif. to petition for writs of review (filed June 29, 1951), *United Air Lines, Inc. and Western Air Lines, Inc.* v. *Public Utilities Commission of California*, Case Nos. 18426 and 18427, Supreme Court of California, review denied August 2, 1951 (unreported).

portation. But that problem is not presented to the Court by the facts of this case. The interstate transportation here involved is of substantial volume, and is provided with full knowledge of its nature and under arrangements with connecting carriers. Appellees have it within their power to dissolve these arrangements and to adopt other measures to minimize the likelihood of interstate carriage. Until they have done so, however, these activities clearly are in violation of the statute and should be enjoined.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgments of the District Court should be reversed with instructions to issue preliminary injunctions.

Respectfully submitted.

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